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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (App. B, *infra*) is reported at 360 F. Supp. 643. The memorandum opinion of the district court granting appellee's motion for a preliminary injunction (App. A, *infra*) is reported at 350 F. Supp. 167.

JURISDICTION

The judgment of the three-judge district court (App. D, *infra*), enjoining the discharge of appellee Ballard, was entered on July 18, 1973. A notice of appeal was filed on August 14, 1973 (App. E, *infra*).

The government's motion for a new trial, filed July 6, 1973 (App. C, *infra*), was denied on August 23, 1973 (App. F, *infra*). A second notice of appeal was filed on September 20, 1973 (App. G, *infra*). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the district court erred in using the "compelling governmental interest" test, rather than the "rational basis" test, in reviewing the constitutionality of military statutes creating differences in personnel administration based on sex.

2. Whether the differences in the Naval attrition statutes relating to men and women lieutenants (10 U.S.C. 6382 and 6401, respectively) are in violation of the Constitution.

STATUTES INVOLVED

10 U.S.C. 6382 provides in relevant part:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time.

10 U.S.C. 6401 provides in relevant part:

> (a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which—

(1) she is not on a promotion list; and

(2) she has completed 13 years of active commissioned service * * *.

STATEMENT

The appellee, Lieutenant Robert C. Ballard, U.S.N., having twice failed of selection for promotion to lieutenant commander, was scheduled for discharge from the Navy no later than June 30, 1972, pursuant to the mandatory requirement of 10 U.S.C. 6382(a). That statute is a typical one requiring thinning of the ranks to retain the best qualified officers and to permit orderly promotion of lower ranking officers.[1]

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[1] Section 6382(a) appeared as Section 312(h) of the Officer Personnel Act of 1947, 61 Stat. 860, which, in turn, was derived from Section 12(c) of the Act of June 23, 1938, 52 Stat. 949. See H. Rep. No. 2134, 75th Cong., 3d Sess., p. 3; S. Rep. No. 2120, 75th Cong., 3d Sess.; H Conf. Rep. No. 2764, 75th Cong., 3d Sess. "The basic objectives of the * * * [1947 Act] were to provide a better opportunity for a reasonable career to the well qualified officer, to provide for greater equality of promotion opportunities by producing a more positive flow of promotion, to create a practical method to accelerate the promotion of outstanding officers in all grades, and to meet the increased need for specialization in certain fields." Seymour, *Promotion of Officers in the Naval Service*, 1956 JAG Journal 5, 6. See also H. Rep. No. 640, 80th Cong., 1st Sess.; Fink affidavit, p. 5.

The parts of the Officer Personnel Act of 1947 affecting naval officers were codified in 10 U.S.C. 5401, *et seq.* by the Act of Aug. 10, 1956, 70A Stat. 1. Earlier reforms of the naval officer promotion system (which originally was based solely on seniority) were enacted by the Act of July 16, 1862, 12 Stat. 583; Act of Aug. 29, 1916, 39 Stat. 556; Act of Mar. 3, 1931, 46 Stat. 1482; Act of May 29, 1934, 48 Stat. 814; and Act of June 23, 1938, 52 Stat. 944. See Fink affidavit, pp. 2–4.

Although Lt. Ballard's performance of his duties was satisfactory, he was considered to be in the lower 15 percent of eligible lieutenants by two separate selection boards, and was not recommended for promotion. Hence, he became subject to the mandatory discharge requirement of 10 U.S.C. 6382. As an officer discharged under 10 U.S.C. 6382, Lt. Ballard would be entitled to $15,000 severance pay. 10 U.S.C. 6382(e).

On June 16, 1972, Lt. Ballard filed suit in the district court, alleging that 10 U.S.C. 6382 was unconstitutional in requiring his discharge after (in his case) some nine years of commissioned service, whereas 10 U.S.C. 6401(a) required discharge of women Navy lieutenants not on a promotion list only after 13 years of commissioned service.[2]

A three-judge court, convened under 28 U.S.C. 2282,

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[2] 10 U.S.C. 6401(a) applies to women line and staff lieutenants on the active list (regulars appointed under 10 U.S.C. 5590). A similar statute applies to men and women lieutenants in the Nurse Corps (appointed under 10 U.S.C. 5580). 10 U.S.C. 6396 (c). Both of these statutes operate if the lieutenant involved is "not on a promotion list" during the fiscal year in which 13 years of service is completed. In other words, they require discharge at that time even if the lieutenant was never considered for promotion (rather than considered and passed over twice). See Fink affidavit, p. 7. Women staff lieutenants of the medical, dental, judge advocate general, and medical service corps (appointed under 10 U.S.C. 5574, 5578, 5578a and 5579) are subject to the same attrition statute which applies to male lieutenants (10 U.S.C. 6382). Reserve women lieutenants serving on active duty (line, staff, and Nurse Corps) are subject to elimination from active status under conditions similar to those prescribed for separation of regulars in these components. See 10 U.S.C. 6403, 6389, 6397.

granted a preliminary injunction enjoining appellee's discharge pending a final decision.[3] 350 F. Supp. 167 (App. A, *infra*). Following presentation of additional affidavits and other documents, and a hearing, the court concluded that the 13-year selection out provision of 10 U.S.C. 6401 favors women Navy officers and constitutes an invidious discrimination against male Navy officers mandatorily discharged under similar conditions before completing 13 years of service (App. B, *infra*, p. 19a). The court, citing *Frontiero* v. *Richardson*, 411 U.S. 677, held that the "compelling governmental interest" test applied, and that the differences between 10 U.S.C. 6382 and 6401 were not supported by any compelling interest perceptible to it. The court enjoined the government from discharging Ballard "solely because of passovers in grade as provided for in Section 6382 prior to the expiration of 13 years of commissioned service * * *" (App. B, *infra*, p. 20a, App. D, *infra*, p. 23a). 360 F. Supp. 643, 648.

After the court issued its written opinion (on June 26, 1973), and prior to the entry of its judgment (on July 18, 1973), the government on July 6, 1973 filed a motion for a "new trial" (App. C, *infra*, pp. 21a–22a), together with an additional affidavit.[4] This affidavit pointed out that, of a total of 71,689 officers on active duty in the Navy (as of November 1972), 68,456 were men and only 3,233 were women (pp. 2, 13); that all male Navy lieutenants in the Regular Navy (numbering 16,585) would be guaranteed a 13-

[3] A temporary restraining order had previously been entered on June 20, 1972.

[4] Affidavit of Capt. E. R. Fink, JAGC, U.S.N. (July 6, 1973).

year tenure out if the court's order should be followed and upheld (p. 2);[5] that there are only 167 women lieutenants in the Naval service who could be subject to 10 U.S.C. 6401(a) (p. 2);[6] that the 13-year selection out provision in 10 U.S.C. 6401 for women lieutenants presently had the effect of counteracting other traditional barriers to full participation and promotional opportunity for women officers in the Naval service, including previous size and promotion limitations,[7] and continuing restrictions against service by women on combatant vessels and aircraft, 10 U.S.C. 6015 (pp. 10–12); that if equalization should be absolutely required, a more appropriate form of equalization in terms of overall needs of the service would be to eliminate altogether the 13-year provision and open up more Navy positions to women officers, thus creating more promotional opportunity for women officers, rather than create an across-the-board 13-year selec-

[5] Some 238 lieutenants were subject to mandatory discharge under 10 U.S.C. 6382 on June 30, 1972. Forbes affidavit, p. 1. Under present Secretarial promotion policy, the effect of this is to open up 238 additional vacancies for promotion of regular lieutenants (junior grade).

[6] Women officers on active duty numbered 3,233 (as of November 1972). Of these, 733 were women line or staff appointees, regular (504) or reserve (229); and 2,500 were women members of the Nurse Corps or other integrated staff corps, regular (702), temporary (1), or reserve (1,797). See Fink affidavit, p. 13.

[7] In 1967 Congress repealed the prior restrictions on overall number of women in the Navy (enlisted and officers), restrictions against promotion to captain, and age limitations, and authorized the promotion of women, in certain circumstances, to flag rank. See Sections 1(14), 1(16), 1(18)(L), 1(19) and 1(24) of the Act of Nov. 8, 1967, 81 Stat. 374; S. Rep. No. 676, 90th Cong., 1st Sess.; Fink affidavit, pp. 8–10.

tion out provision for all male Navy lieutenants (pp. 8–9, 12); and that, because of fiscal limitations, the immediate effect of the court's order, if followed in related class action litigation, could be to jeopardize the retention (through the end of the present fiscal year) of 630 lieutenants (junior grade) (pp. 11–12).

The court without opinion denied the government's motion for a new trial.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important questions concerning the constitutionality of carefully formulated statutory provisions designed to facilitate the retention and promotion of the best qualified naval officers. As explained in the affidavit supporting the government's motion for a new trial discussed above, the different time periods for retention of male and female officers reflect the practical needs and sound personnel operations of the Navy and rest upon compelling public policy considerations. The relief the district court ordered would have a serious adverse impact upon the Officer Corps of the Navy. Plenary review by this Court of a decision with such serious consequences is necessary.

1. The court below erroneously held that the difference in the retention time for male and female naval officers must be supported by a "compelling governmental interest" sufficient to overcome a "suspect" classification. The issue whether differences in treatment based on sex must be supported by such a compelling interest, or instead by the usual "rational basis" showing, was not resolved by this Court in

Frontiero v. *Richardson*, 411 U.S. 677, involving differences in eligibility for military dependent's allowances. In that case only four Justices adopted the compelling governmental interest test; four other Justices, while concurring in the result, either rejected that test or were of the opinion that the issue should not be reached in that case. At least in matters affecting the organization and military readiness of the armed services, the application of the "suspect" classification standard is inappropriate. See *Orloff* v. *Willoughby*, 345 U.S. 83, 94.

2. In any event, the differences between 10 U.S.C. 6382 and 6401 are in fact supported by a compelling governmental interest. This interest (which *a fortiori* would constitute a "rational basis" for the difference) is based on a combination of complex factors, both historical and practical. The Navy, like the other military services, traditionally has been a male-dominated service; duty on board combatant vessels and aircraft is still restricted by statute to males, 10 U.S.C. 6015; male officers far outnumber female officers; and a system of orderly and assured promotion or selection out, based solely on fitness, has been considered by Congress to be essential for the maintenance of an efficient and motivated officer command structure.[8]

Competent line and staff officers of every rank are required in the operational units of the Navy (which are largely made up of combatant vessels) and in support, staff and specialized units. However, Congress fixes by statute the total number of personnel—officer and enlisted—in the Navy, and reviews and

[8] See *supra*, n. 1.

approves or disapproves the Navy's proposed ratio of officers to enlisted persons. *E.g., Section* 301, 86 Stat. 735; 86 Stat. 1184; H. Rep. No. 1389, 92d Cong., 2d Sess., p. 48. In addition to reviewing the ratio of officers to enlisted persons, Congress has set by statute the distribution of the total number of unrestricted line officers within the various grades. See 10 U.S.C. 5442. Promotions are based on merit and, in the case of most officers, on vacancies in the next higher grade. 10 U.S.C. 5707, 5756, 5769. Separate promotion systems are established for unrestricted line officers (those eligible to command at sea), restricted line officers (those not eligible to command at sea), and for staff officers (supply, medical corps, etc.). See 10 U.S.C. 5769(b), 5773.

Thus, officers generally compete for promotion against officers of similar experience for the more limited vacancies which exist in the next higher grade. The selection out rule for male lieutenants twice passed over is a necessary part of a system designed to limit the Naval service to the best qualified, and to assure timely promotion of qualified younger officers.[9]

Women line and staff officers are promoted under a separate system because they lack the combatant and sea duty of male officers, and accordingly have not only less competitive advantage, but fewer command positions to which they could be promoted. See Kinnear affidavit, pp. 2–4. Moreover, promotion of women lieutenants (junior grade) is not dependent on vacan-

[9] See Kinnear affidavit, pp. 1–3; Connally affidavit, p. 1; Fink affidavit, pp. 4–6.

cies in the women lieutenant grade. Connally affidavit, pp. 2–3; 10 U.S.C. 5760. Since 1967 and within the women's promotion system, the Secretary of the Navy has initiated, as a matter of personnel policy, a program to accelerate the promotions for women. Today, because of Secretarial policy, women are considered for promotion within the same time periods as men.

During normal peace-time conditions it is expected that a male lieutenant would complete about 13 years of commissioned service before he was passed over twice.[10] But Congress has permitted an acceleration of promotions (temporary promotions) for male officers to meet the rising need for officers during wartime conditions, as in the case of the recent conflict in Southeast Asia.[11] That conflict, and prior periods of international tension, have had the effect of reducing the promotion time for lieutenants, and the selection out time for those passed over twice, to eight or nine years.[12] In the post-war period the opposite trend may be expected, when the oversupply of officers created by the war is reduced. In these circumstances the

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[10] See Section 308(a)(13) of the Officer Personnel Act of 1947, 61 Stat. 846; now 10 U.S.C. 5768(a) (12 year normal total commissioned service for male line lieutenants). Those lieutenants considered for promotion to lieutenant commander for the *second* time would attain 13 years of commissioned service. See Fink affidavit, p. 6; Connally affidavit, pp. 1–2.

[11] 10 U.S.C. 5751(b) fixes minimum service-in-grade requirements for consideration for promotion. It was suspended by the President in 1968 under the authority of 10 U.S.C. 5785(b). See Executive Order No. 11437 (Dec. 2, 1968), 33 Fed. Reg. 17945.

[12] Connally affidavit, p. 2.

selection out statutes applicable to male officers continue to serve a necessary purpose. A 13-year selection out period for twice passed over male lieutenants would be detrimental to the needs of the service, and would be inconsistent with maintenance of a highly qualified and competitive Naval officer corps.[13]

Women lieutenants are presently subject to the same 13-year tenure originally enacted in 1948 as the practical equivalent then to the peace-time selection out time for male lieutenants twice passed over.[14] Congress may decide to amend this provision to conform to the selection out rules applicable to male lieutenants.[15] However, Congress has not yet done so, presumably because the retention for 13 years of women lieutenants (who have been passed over twice or otherwise have not been promoted) has not been considered inconsistent with the needs of the Naval service.[16] The lack of equivalent promotional opportunity for women,

[13] The number of promotion opportunities for the grade of lieutenant would be lessened if twice-passed-over lieutenants were allowed to continue serving in that grade, in view of the long-standing policy of the Secretary of the Navy that promotion of lieutenants (junior grade) depends on vacancies by attrition or promotion in lieutenant ranks.

[14] 10 U.S.C. 6401, originally enacted as Section 207(j) of the Women's Armed Services Integration Act of 1948, 62 Stat. 368, was so explained in Hearings Before the Senate Armed Services Committee on S. 1103, S. 1527, and S. 1641, 80th Cong., 1st Sess., p. 39. See also Fink affidavit, pp. 7–8, 9.

[15] A draft bill presently being considered by the armed services would substitute for Section 6401 the same provisions which govern male Navy lieutenants (Section 6382). See Fink affidavit, pp. 9–10.

[16] The 1967 Act relating to women members of the armed forces (*supra*, n. 7) made no changes to Section 6401. S. Rep. No. 67, 90th Cong., 1st Sess., p. 13.

and the relatively small number of women line officers in the service, would explain this, if explanation is necessary. See *Frontiero* v. *Richardson*, 411 U.S. 677, 689, n. 22.[17]

This conclusion is strengthened by an examination of the basis of the decision in *Frontiero, supra*. The plurality opinion of Mr. Justice Brennan observed that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." 411 U.S. at 686–687. The statute in issue here has had no such effect. While providing additional tenure protection for female officers, it has not relegated male officers to an "inferior legal status."

The effect of the judgment in this case is to give males a benefit not intended by Congress, under the guise of a remedy for unconstitutional discrimination. Ironically, the statutory provision being used to achieve this result is one that, unlike the examples discussed in *Frontiero*, has the effect of advancing the status of women, in compensation for their traditional disadvantages in military careers.

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[17] Moreover, a 13-year tenure for women lieutenants does not jeopardize promotion of women lieutenants (junior grade), since all women lieutenants (junior grade) are eligible for promotion to lieutenant, regardless of the number of lieutenants. 10 U.S.C. 5760; Connally affidavit, pp. 2–3.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1973.

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APPENDIX A

[Filed October 25, 1972, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civ. No. 72-218-S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

vs.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Memorandum

Before CARTER, Circuit Judge, and EAST and SCHWARTZ, District Judges[1]

EAST, *Senior District Judge:* This three-judge District Court heard counsel for the parties on September 12, 1972, upon the Defendants' Motion to Dissolve

[1] Honorable James M. Carter, Senior United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, Edward J. Schwartz, Chief Judge, United States District Court for the Southern District of California, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated July 24, 1972.

Three-Judge District Court and the Plaintiff's Motion for a Permanent Injunction and Declaration of Unconstitutionality.

We ordered the Temporary Restraining Order entered herein on June 20, 1972, ordering "that pending a final decision * * *, plaintiff will not be discharged from the Armed Services of the United States," be continued and took the cause as submitted.

DEFENDANTS' MOTION

On July 24, 1972, Chief Judge Edward J. Schwartz certified to Chief Judge Richard H. Chambers, of the Court of Appeals for the Ninth Circuit, that the complaint herein raised issues under the Equal Protection Clause and Fifth Amendment of the United States Constitution and sought injunctive relief and, further, "that in [his] opinion, the challenge addressed to the act of Congress (Title 10 U.S.C. Sec. 6382) requires the formation of a District Court of three judges composed as required in (Title 28 U.S.C. Sec. 2284)." We subscribe to the certificate of Chief Judge Schwartz, and also take cognizance that acts of Congress and regulations thereunder providing for demotion in grade or dismissal from service for cause, i.e., incompetency, disobedience, etc., as all other measures for the forfeiture of entitlements, must provide for a reasonable measure of due process notice and hearing. *Goldberg* v. *Kelly*, 397 U.S. 254 and *Bell* v. *Burson*, 402 U.S. 535, 539.

Therefore, we conclude that the challenged Section 6382 is subject to judicial scrutiny for Equal Protection and Due Process Clauses defects and deficiencies. *Korematsu* v. *U.S.*, 323 U.S. 214, 216 (1944), and *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

This Court's jurisdiction is noted under Title 28 U.S.C. Secs. 2201 and 2202, (Declaratory Judgment);

Sec. 1331 (Equity Jurisdiction); and Secs. 2282 and 2284 (Restraining the Enforcement of Acts of Congress—Three-Judge District Court). Accordingly, the defendants' motion is denied. *Frontiero* v. *Laird,* 327 F. Supp. 580 (M.D. Ala., 1971); and *Keyishian* v. *Board of Regents,* 345 F. 2d 236 (2d Cir., 1965.)

PLAINTIFF'S MOTION

Counsel urged that the cause was ripe for submission on the merits; however, for the reasons later stated, we consider it appropriate and expedient to deal with plaintiff's motion as one for a preliminary injunction under Secs. 2282 and 2284(3), supra, and Rule 65 F.R. Civ. P.

We point out that the defendants have not appeared herein, except through their motions herein, and we have only a record comprised of plaintiff's complaint, its exhibits, affidavits on behalf of the plaintiff and, on behalf of the defendants, the affidavit of Rear Admiral B. B. Forbes, Jr. and a signed affidavit of one Robert F. Connally, filed September 13, 1972.

For the purpose of this memorandum, we accept the allegations and averments before us as true and find that plaintiff:

1. Is a Lieutenant in the U.S. Navy and has been a commissioned officer since August 16, 1962, for a total of more than nine years continuous active commissioned service. Prior to commission, he served seven years as an enlisted man.

2. Has served with distinction in the U.S. Navy and with overall outstanding fitness reports. In all of his fitness reports he has been recommended for promotion.

3. Was scheduled to be discharged and would have been, but for the restraining order, on June 30th last, from the naval service for the sole reason that plain-

tiff had not been promoted to Lt. Commander during the nine years and ten and one-half months that plaintiff has been in active commissioned service as required by Sec. 6382, supra.[3]

4. If discharged as of June 30th, last, will receive severance pay of approximately $15,000, as opposed to approximately $200,000 of benefits which would accrue to him if allowed to serve in commissioned status at least thirteen years.

ACTS OF CONGRESS INVOLVED

Title 10, U.S.C. Sec. 6382(a) provides, inter alia:

> Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the nurse corps, * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time. However, if he so requests he may be honorably discharged at any time during that fiscal year.

Title 10, U.S.C. Sec. 6401(a) provides, inter alia:

> Each woman officer on the active list of the Navy, appointed under Sec. 5590 of this Title, who holds a permanent appointment in the grade of lieutenant, * * * shall be honorably

[3] Communication of the Department of the Navy, Chief of Naval Personnel, to Plaintiff dated 17 March 1972, stating inter alia: "(Sec. 6382, supra) requires that officers of your category be honorably discharged on 30 June of the fiscal year they twice fail of selection for promotion to lieutenant commander. This provision of the law provides no latitude with regard to your continuation on active duty beyond 30 June 1972. Accordingly, your discharge will be processed for 30 June 1972 unless you request earlier separation * * *" (Complaint Exh. "A").

> discharged on June 30 of the fiscal year in which she is not on a promotion list; and too, she has completed 13 years of active service in the Navy * * *. However, if she so requests, she may be honorably discharged at any time during that fiscal year.

DISCUSSION

The defendants urge that under this factual picture, the plaintiff is seeking judicial relief from purely executive or command policy or function dictating his non-continuance in commissioned naval service. True it is that courts have held that "Armies cannot be maintained and commanded, and wars cannot be won by the judicial process. Supervision and control over the selection * * * and dismissal of officers are not judicial functions." *Beard* v. *Stahr*, 200 F. Supp. 760 (Dis. Col., 1961) and *Struck* v. *Secretary of Defense*, F. 2d (9th Cir., Nov. 15, 1971) Pet. for Cert. filed, and their followers.

However, here we are faced with the claim, not faced by the Court in *Beard* and *Struck*, supra, that the enforcement of Sec. 6382 and any regulations adopted thereunder against the plaintiff constitutes an invidious discrimination between sexes[3] in naval service and violates his United States Constitutional guarantees, namely, the Equal Protection and Due Process Clauses. *Beard* and *Struck*, supra, are accordingly distinguishable and not authority on our constitutional issues. We presently are inclined to the view that executive or command decision has nothing

[3] We do not intend to elaborate upon the current naval command policy of placing women officers in command positions in parity with men so far as practicable, except to comment an all out effort is being made to reach that goal. (See news releases on record for our information)

whatever to do with the proposed discharge of plaintiff on June 30th, last. On the contrary, the discharge is mandatory through the operation of the unqualified legislative edict of Sec. 6382. This is established by the affidavit of Rear Admiral B. B. Forbes, Jr., U.S.N., attached to defendants' brief. The Admiral states: "Two hundred and thirty-eight male lieutenants of the Regular Navy were subject to the *mandatory discharge* from the Navy on June 30, 1972, pursuant to the provisions of Sec. 6382 * * *. Thirty-one of these officers have served more than 18 years active duty on June 30, 1972 and, after discharge, they were granted commissions as active-duty officers in the United States Naval Reserve. This was done pursuant to a long-established policy within the Navy." [Emphasis supplied.]

It is manifest that the only command function or policy exercised over the 238 male lieutenants was applicable to the 31 who received the active duty Reserve status, while the remaining 207 male lieutenants were discharged pursuant to the legislative edict.

The recurring imbalance of demand and supply of active duty officers for the various grades taxes the rational exercise of command policy and decision. Sometimes this imbalance results in an acceleration and at other times in a slowing down of the command set time interval between promotions of officers. Yet, Sec. 6382, enacted in 1947, obviously a post Second World War legislative weeding edict, operates on the turn of the calendar.

The act on its face appears to be a valid legislative enactment; however, the Supreme Court has often held that a valid statute was unconstitutionally applied to the circumstances of an individual. The rationale of *Broddie* v. *Connecticut*, 401 U.S. 371 (1971)

is applicable with its full force in this cause. There the fee payment requirement of a statute operated unequally against the indigent. Here the statute operates unequally against a male officer when compared to a comparable statute operating favorably to the female officer.

There is an ever-increasing weight of sound judicial authority recognizing that laws, regulations and entitlement pre-requisites and forfeitures resulting in a more favorable treatment to a class of one sex, as opposed to the other, results in unconstitutional discrimination and unequal protection of the laws. *Diaz* v. *Pan American Western Airway,* 442 F. 2d 385 (5th Cir. 1971) *cert. denied* 404 U.S. 950. The Supreme Court has spoken directly against sex discrimination in legislative acts. *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942).

Grave constitutional questions and issues arising under the Equal Protection Clause, as well as probably the Due Process Clause, are presented herein. We are not inclined to finally deal with them hastily, and particularly without any showing of executive or command interest or necessity for the apparent discriminatory treatment of plaintiff when compared to the guaranteed 13 years of service to female officers in the same category of non-promoted officers.

We conclude that: (a) The plaintiff, if he is unlawfully discharged as of June 30th, last, will suffer great monetary loss without recourse and irreparable injury by being precipitantly discharged from his career as a naval officer without an opportunity to fully contest the constitutionality thereof; (b) if plaintiff's discharge is enjoined pending final determination herein, the Government will sustain no substantial loss, if indeed any, by reason of recoupment against sever-

ance pay; (c) the equities herein are with the plaintiff; and (d) there is a probability that plaintiff will prevail and the status quo should be maintained.

Accordingly, a preliminary injunction shall issue herein restraining and enjoining the defendants from discharging the plaintiff from commissioned naval service pursuant to the provisions of Sec. 6382, until final determination and further order herein.

This memorandum shall stand as the Court's findings of fact and conclusions of law as provided for by Rule 52(a) F.R. Civ. P.

Counsel for the plaintiff is requested to prepare, serve and present herein appropriate order within 15 days from the date hereof.

The defendants are requested to file herein within 30 days from the date hereof, such Answer and further showing to the issues of plaintiff's complaint as they shall deem appropriate, else be in default herein. The plaintiff shall have 15 days from the date of service to make reply.

The Honorable Edward J. Schwartz, Chief Judge of this District Court, is delegated to conduct all appropriate pre-trial proceedings, and the cause is set for final hearing on January 9, 1973, at 2 o'clock p.m., or as soon thereafter as counsel may be heard.

Dated this 25th day of October 1972.

James M. Carter
JAMES M. CARTER,
Senior U.S. Circuit Judge.

William G. East
WILLIAM G. EAST,
Senior U.S. District Judge.

Edward J. Schwartz
EDWARD J. SCHWARTZ,
Chief Judge.

APPENDIX B

[Filed June 26, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72–218–S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER, FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Opinion

Before CARTER, Circuit Judge, EAST and SCHWARTZ, District Judges[1]

EAST, *Senior District Judge:*

STATEMENT OF CASE

FACTUAL SITUATION

It appears from the complaint herein that:

[1] Honorable James M. Carter, Senior United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, Edward J. Schwartz, Chief Judge, United States District Court for the Southern District of California, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated July 24.

The plaintiff, Lt. Robert C. Ballard, U.S.N. (Ballard) as of June 16, 1972, has been in continuous active commissioned service (service) in the United States Navy (USN) since August 16, 1962, and had attained the commission grade of lieutenant, USN. Prior to commissioning, Ballard had served in the USN as an enlisted man for seven years.

Notwithstanding a continuing meritorious service on his part, and pursuant only to command function regulation and custom, Ballard had not been promoted to the grade of lieutenant commander and had twice been passed over for such promotion.

The parties concede that on or about March 17, 1972, the Chief of Naval Personnel, USN, acting for himself and all the defendants in their respective capacities, respectively, advised Ballard that the provisions of 10 U.S.C. 6382 required that he, and other "officers of [his] category be honorably discharged on 30 June of the fiscal year they twice fail of selection for promotion to lieutenant commander. This provision of the law provides no latitude with regard to your continuation on active duty beyond 30 June 1972. Accordingly, your discharge will be processed for 30 June 1972 unless you request earlier separation * * *."

STATUTES

The pertinent statutes involved in this cause are 10 U.S.C. 6382:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time.

and 10 U.S.C. 6401:

> (a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which——
>
> (1) she is not on a promotion list; and
>
> (2) she has completed 13 years of active commissioned service in the Navy. * * *"

BALLARD'S CONTENTIONS

Ballard filed his complaint herein on June 16, 1972, wherein he contended, inter alia, that:

(a) If discharged on June 30th next pursuant to the provisions of Section 6382 he would be caused very substantial monetary damage through the loss of retirement benefits to which he would be entitled on or about January 1, 1975, and further, that he would suffer irreparable damage to his Naval career through the unequal treatment and protection of the laws of the United States;

(b) Section 6401 grants female officers a minimum tenure term of 13 years commissioned service before mandatory discharge thereunder and Section 6382 grants male officers in like grade and situation no tenure;

(c) He is being discharged pursuant to Section 6382 without the benefit of 13 years service, accordingly, the section "discriminates against him because of his sex when compared to * * * Section 6401 which applies to women [in like grade and situation] and that this deprives [him] of a benefit solely because of his sex," all violative of the equal treatment and protection clause of the Fourteenth Amendment to the United States Constitution; and

(d) Further, he is being otherwise denied his constitutional rights under the due process clause of the Fifth Amendment to the United States Constitution.

RELIEF

Ballard sought temporary restraining order and permanent declaratory and injunctive relief from the threatened discharge, and on June 20, 1972, the Honorable Edward J. Schwartz, District Judge of this District, issued herein the requested temporary restraining order. Thereafter, this three-judge District Court was convened and upon hearing the parties, denied several motions of the defendant and continued the temporary restraining order in effect. On October 25, 1972, this three-judge court entered its Memorandum, Ballard v. Laird, et al., 350 F. Supp. 167, directing the issuance of a preliminary injunction enjoining the discharge of Ballard pursuant to Section 6382 until final determination and set a date certain for final hearing of the cause on its merits.

On March 8, 1973, we heard the parties on motions putting the cause to us on its merits, received into evidence further written agreement of facts, documents and affidavits offered by the parties and took the cause under submission.

Findings of Fact

This court made findings of fact upon the evidence then submitted and stated reasons for its conclusions in the Memorandum. Those reasons are again made and stated herein by reference and findings of fact of the Memorandum repeated as follows:

We find that plaintiff:

1. Is a Lieutenant in the U.S. Navy and has been a commissioned officer since August 16, 1962, for a total of more than nine years continuous active com-

missioned service. Prior to commission, he served seven years as an enlisted man.

2. Has served with distinction in the U.S. Navy and with overall outstanding fitness reports. In all of his fitness reports he has been recommended for promotion.

3. Was scheduled to be discharged and would have been, but for the restraining order, on June 30th last, from the naval service for the sole reason that plaintiff had not been promoted to Lt. Commander during the nine years and ten and one-half months that plaintiff has been in active commissioned service as required by Sec. 6382, supra.

4. If discharged as of June 30th, last, will receive severance pay of approximately $15,000, as opposed to approximately $200,000 of benefits which would accrue to him if allowed to serve in commissioned status at least thirteen years.

In addition, we find that:

As of March 8, 1973, Ballard had increased his continuous commissioned service to a total of 10 calendar years, 6 calendar months and 22 days, and that the service of Ballard utilized under the restraining orders had been of high merit and much value to the USN;

The threatened USN order of discharge, under restraint, as aforesaid, continues to be implemented and based solely upon the mandatory discharge provisions of Section 6382; and

No woman USN officer has been heretofore discharged from commissioned service pursuant to the provisions of Section 6382.

DISCUSSION

We reach Ballard's claims of unequal and discriminatory treatment arising from the enforcement

of the mandatory discharge requirements of Section 6382 under the due process clause of the Fifth Amendment to the United States Constitution.

> [W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe*, 347 U.S. 497, 499." *Schneider* v. *Rusk*, 377 U.S. 163 (1964), at 168, (favoring native born over naturalized citizens).

Bolling tells us that "[w]e have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools." "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." at 499. So, "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government," at 500, under the due process clause.

There is no evidence before us nor is it contended by the defendants that "having failed of selection for promotion" or "is not on a promotion list" is necessarily related to quality of service on the part of the officer, male or female, nor do the mandatory discharge provisions respectively involve in any manner the exercise of USN command function or policy governing the promotion and discharge, for cause, of any USN commissioned officer. Accordingly, as noted in the Memorandum, such authorities as *Beard* v. *Stahr*, 200 F. Supp. 766 (D. C. 1961), and *Struck* v. *Secretary*, 460 F. 2d 1372 (9th Cir. 1972), *cert. granted and remanded*, 409 U.S. 947, 1071 (1972), are distinguishable and of no concern to us.

The mandatory discharge provisions of each of the sections are pure and simple legislative dictates and commands of an administrative or fiscal character and policy. In the Memorandum we spoke of the imbalance of supply and demand of commissioned officers caused by the rise and ebb of national emergencies and of the taxing of command decision and function in the acceleration and deferring of the time intervals of promotion caused thereby.

It is the result of this imbalance that placed Ballard in the grade of lieutenant prior to the time lapse of the norm of prescribed promotion intervals and kept him in that grade for the two passovers. Thus was created the surplus of some 238 USN lieutenants who were subject to Section 6382 discharge on June 30, 1972, all for the lack of vacancies in the grade of lieutenant commander.

We deem the mandatory discharge provisions of Section 6382 to be legislative fiscal outlay saving devices for the weeding out of a surplus of USN officers in a given grade before the vesting of retirement benefits. We acknowledge that no constitutional quarrel can be made over such a legislative policy per se. Yet, the Memorandum anticipated and we now see a constitutional ban against the built-in invidious discriminatory application of the legislative mandatory discharge provisions of the statutes which favor the members of one sex over the other.

Congress gave the judiciary the vehicle of the civil rights act to facilitate the destruction of sex discriminatory practice in private business. *Diaz* v. *Pan American Western Airway,* 442 F. 2d 385 (5th Cir. 1971), *cert. denied,* 404 U.S. 950 (female preference in employment); *Rosen* v. *Public Service Electric and Gas Co.,* 3rd Circuit, slip opinion March 8, 1973 (female preference in retirement plan); *Eslinger* v. *Thomas,*

4th Circuit, slip opinion March 28, 1973 (male preference in appointment of state senate pages).

Here we are sought to utilize and implement the self-executing due process clause to destroy the governmental sex discriminatory practice sponsored by the two statutes.

In *Reed* v. *Reed*, 404 U.S. 71 (1971), the court had under challenge of equal protection clause infringement a state statute giving mandatory preference to male over female applicants, without regard to their individual qualification (sole basis of sex), for appointment as administrator of decedent's estates. In short, the court thought the statute provided "dissimilar treatment for men and women who are . . . similarly situated," at 77, and "thus establishes a classification subject to scrutiny under the equal protection clause," at 75. The court held that state's interest (reducing the work load on probate courts) "is not without some legitimacy," but is "inconsistent with the command of the equal protection clause." "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment," at 76.

As were the discriminatory business and state practices involved in those cases, so is the challenged government's practice under the two sections under challenge here. The plain reading of the two sections when applied gives the female officers a guaranteed tenure term of 13 years commissioned service, except, of course, for a discharge for cause, and male officers, similarly situated, no such guaranteed tenure of service within which time to achieve the required grade and forestall the mandatory discharge.

Controlling our decision now is *Frontiero* v. *Secretary,* United States Supreme Court, slip opinion May 14, 1973, 41 LW 4609.

Mrs. Frontiero was a member of the uniformed services. In order to obtain "dependent" increased quarters allowance and medical expense benefits allowable under a set of statutes she was required to show in fact that her husband was dependent upon her for over one-half of his support. Under those statutes a male in the service could claim his wife as a "dependent" whether or not she was in fact dependent upon him for any part of her support. She claimed due process clause infringement arising from the required application and actual support showing procedures.

The court in *Frontiero* located the fount of its rationale in the teachings of *Reed,* supra, and quickly concluded that

> classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny,

under the due process clause of the Fifth Amendment.

We paraphrase Frontiero's main claim of lack of due process under the law to fit Ballard's claim of discriminatory treatment, i.e., Frontiero "asserted that the discriminatory impact of the statues is twofold: First * * * [demonstration of dependency]; and second, as a substantive matter, a [female] member [is granted tenure in service] while a similarly situated [male] member is denied such benefits."

Whether the discriminatory impact results in favoring the female rather than the male is no logical differential in the utilization of the teachings of *Frontiero. Diaz,* supra, and *Rosen,* supra, each found no handicap in striking down female favoritism under

the civil rights act—a legislative implement of the equal protection clause, nor do we here in a judicial implementation of the equal protection clause.

Nor do we see any logical reason for a different consideration and treatment because the asserted discriminatory impact and result arises from the combined wording and application of two separate statutes rather than from the wording and application of an interlocking set or single statute.[2]

The court in *Frontiero* had no difficulty in placing women on an equal footing with men in military service benefits. The USN goes further, as it is common knowledge that a women with the grade of captain has been detailed to line command. News releases of USN command policy in evidence dispels any concept of inability between the sexes, per se, to serve in command detail. See note 2 in the Memorandum.

The defendants here attempt to justify the apparent discriminatory impact and force of the statutes through an asserted rational basis for the tenure granted females. There is no evidence of any facts supporting such a rational basis, moreover such a test is improperly asserted. For here, we are faced with an "inherently suspect" classification, and such classifications "are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.'" *Dunn* v. *Blumstein*, 405 U.S. 330 at 342 (1972); *Frontiero, supra,* and *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

As noted above, the mandatory discharge provisions of each of the sections are in the furtherance of gov-

[2] It has been suggested that the 13 year tenure of commission service offered to women under Section 6401 was a recruiting measure. If so, the invidious discriminatory impact is compounded.

ernmental administrative or fiscal policy, but just what governmental administrative, fiscal interest or savings are served by granting female officers 13 years tenure in service and male officers none is not shown. We assume, without deciding, that some does exist, nevertheless, *Reed* and *Frontiero*, each, held that government "interest of some legitimacy" does not survive a judicial scrutiny and detection of an invidious discriminatory practice. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), holds that the alleviation of fiscal expense is not such a compelling state interest to justify infringement of due process, nor is such fiscal concern such a compelling state interest as to justify infringement of equal protection rights, *Shapiro*, supra. We see no logical reason why the government's interests should not be measured by the same yardstick.

CONCLUSIONS OF LAW

We apply the full thrust of the rationale of *Frontiero* and conclude that:

(a) The legislative guaranteed tenure time of commissioned service granted to women under Section 6401 is an inherently suspect classification;

(b) The effect of the tenure provision of Section 6401 in favor of the female USN officers is an invidious discriminatory practice against male USN officers who are mandatorily discharged under similar conditions before 13 years of commissioned service;

(c) The statutory scheme effectuating that discriminatory practice is constitutionally invalid under the due process clause insofar as the same authorizes and directs the mandatory discharge of male USN officers prior to the expiration of 13 years of commissioned service; and

(d) The defendants, and their successors in their respective official capacities, should be:

(1) permanently enjoined and restrained from mandatorily discharging Ballard solely because of passovers in grade as provided for in Section 6382 prior to the expiration of 13 years of commissioned service, and

(2) Ballard should be reinstated to all benefits, increments and placement on the USN list for promotion as he would have been entitled to under law as of the close of June 29, 1972, had he not been considered subject to discharge short of 13 years of continuous USN commissioned service.

This opinion shall constitute this three-judge court's findings of fact and conclusions of law as provided for in Rule 52(a) FRCivP.

Counsel for Ballard is requested to prepare appropriate orders hereunder and to submit the same to counsel for the defendants for approval as to form. In the event counsel for the parties cannot stipulate as to the form of the orders, counsel for Ballard shall submit proposed orders to this court before the expiration of 20 days from the date hereof for hearing and settlement.

Dated this 26th day of June, 1973.

JAMES M. CARTER,
United States Circuit Judge.

WILLIAM G. EAST,
United States District Judge.

EDWARD J. SCHWARTZ,
United States District Judge.

APPENDIX C

[Filed July 6, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

(Defendants' Motion for New Trial Pursuant to Rule 59(b) F.R. Civ. P. or in the Alternative To Amend Finding Pursuant to Rule 52(b) F.R. Civ. P.)

COME NOW defendants by and through their attorneys Harry D. Steward, United States Attorney and Frederick B. Holoboff, Assistant United States Attorney, Southern District of California and move for a new trial pursuant to Rule 59(b) F.R. Civ. P. or in the alternative to amend finding pursuant to Rule 52(b) F.R. Civ. P. upon the following grounds and for the following reasons. This motion is supported by a telephoto of an affidavit or further showing of the U.S. Navy attached hereto which will be replaced when this office receives the actual documents from Washington, D.C.

On page 6 of this Court's written opinion beginning at line 12, this Court stated:

> There is no evidence before us nor is it contended by the defendants that 'having failed of selection for promotion' or 'is not on a promotion list' is necessarily related to quality of service on the part of the officer, male or female, nor do the mandatory discharge provisions respectively involve in any manner the exercise of USN command function or policy governing the promotion and discharge, for cause, of any USN commissioned officer. Accordingly, as noted in the Memorandum, such authorities as *Beard* v. *Stahr*, 200 F. Supp. 766 (D.C. 1961), and *Struck* v. *Secretary*, 460 F. 2d 1372 (9th Cir. 1972), *cert. granted and remanded*, 409 U.S. 947, 1071 (1972), the distinguishable and of no concern to us."

The attachments hereto, in addition to contradicting the aforesaid finding, show that defendants are entitled to the relief requested herein. These attachments or other attachments will be filed as appropriate.

WHEREFORE, defendants respectfully urge that this Court permit a new trial pursuant to Rule 59(b) F.R. Civ. P. or in the alternative amend the finding on page 6 of this Court's opinion pursuant to Rule 52(b) F.R. Civ. P.

Dated: July 6, 1973.

HARRY D. STEWARD,
United States Attorney.
ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division.
FREDERICK B. HOLOBOFF,
Frederick B. Holoboff,
Assistant U.S. Attorney,
Attorneys for Defendants.

APPENDIX D

[Entered July 18, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, USN, PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; ET AL., DEFENDANTS

Order and Judgment

IT IS HEREBY ORDERED AND ADJUDGED in conformity with this Court's written Opinion of June 26, 1973, Civil No. 72-218-S, that defendants, and their successors in their respective official capacities, are:

1. permanently enjoined and restrained from mandatorily discharging plaintiff Ballard solely because of passovers in grade as provided for in § 6382 prior to the expiration of thirteen years of commissioned service, and

2. Plaintiff Ballard should be reinstated to all benefits, increments and placement on the USN list for promotion as he would have been entitled to under law as of the close of June 29, 1972, had he not been con-

sidered subject to discharge short of thirteen years of continuous USN commissioned service.

Dated: July 16, 1973.

JAMES M. CARTER,
United States Circuit Judge.

WILLIAM E. EAST,
United States District Judge.

EDWARD J. SCHWARTZ,
United States District Judge.

Approved as to form:

FREDERICK B. HOLOBOFF,
Assistant United States Attorney.

APPENDIX E

[Filed August 14, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, USN, PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER, FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Notice of Appeal

Defendants, MELVIN LAIRD, Secretary of Defense, JOHN CHAFEE, Secretary of the Navy, VICE ADMIRAL DAVID BAGLEY, U.S.N., Chief of Naval Personnel, and CAPTAIN ROBERT H. LEMMON, U.S.N., Commander, Fleet Training Group, San Diego, California, hereby appeal to the United States Supreme Court from the

order and judgment of the three-judge District Court entered on July 18, 1973.

Dated this 14th day of August, 1973.

Respectfully submitted,

HARRY D. STEWARD,
United States Attorney.

ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division.

FREDERICK B. HOLOBOFF,
Assistant U.S. Attorney,
Attorneys for Defendants.

APPENDIX F

[Filed August 23, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, U.S. NAVY, PLAINTIFF

v.

MELVIN LAIRD, ETC., ET AL., DEFENDANTS

(Order denying motion for new trial and to amend findings of fact and conclusions of law)

Upon consideration of plaintiff's [defendants'] motion for a new trial and to amend the findings of fact and conclusions of law heretofore made and entered herein, and upon consideration of defendants' plaintiff's response, and the court being fully advised in the premises, and being of the opinion that said motion should be denied:

IT IS THEREFORE ORDERED that the plaintiff's [defendants'] motion for a new trial and to amend the findings of fact and conclusions of law be, and the same hereby is, denied.

Dated: August 23, 1973.

James M. Carter,
JAMES M. CARTER,
U.S. Circuit Judge.

William G. East,
WILLIAM G. EAST,
U.S. District Judge.

Edward J. Schwartz,
EDWARD J. SCHWARTZ,
U.S. District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX G

[Filed September 20, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Notice of Appeal

Defendants hereby appeal to the United States Supreme Court from the order and judgment of the three judge District Court entered on July 18, 1973, from the order denying their motion, and not plaintiff's, for new trial and to amend findings of fact and conclusions of law dated, filed and entered on August 23, 1973.

Dated this 19th day of September, 1973.

HARRY D. STEWARD,
U.S. Attorney.

ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division.

FREDERICK B. HOLOBOFF,
Assistant U.S. Attorney.
Attorneys for Defendants.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE
ET AL., APPELLANTS

v.

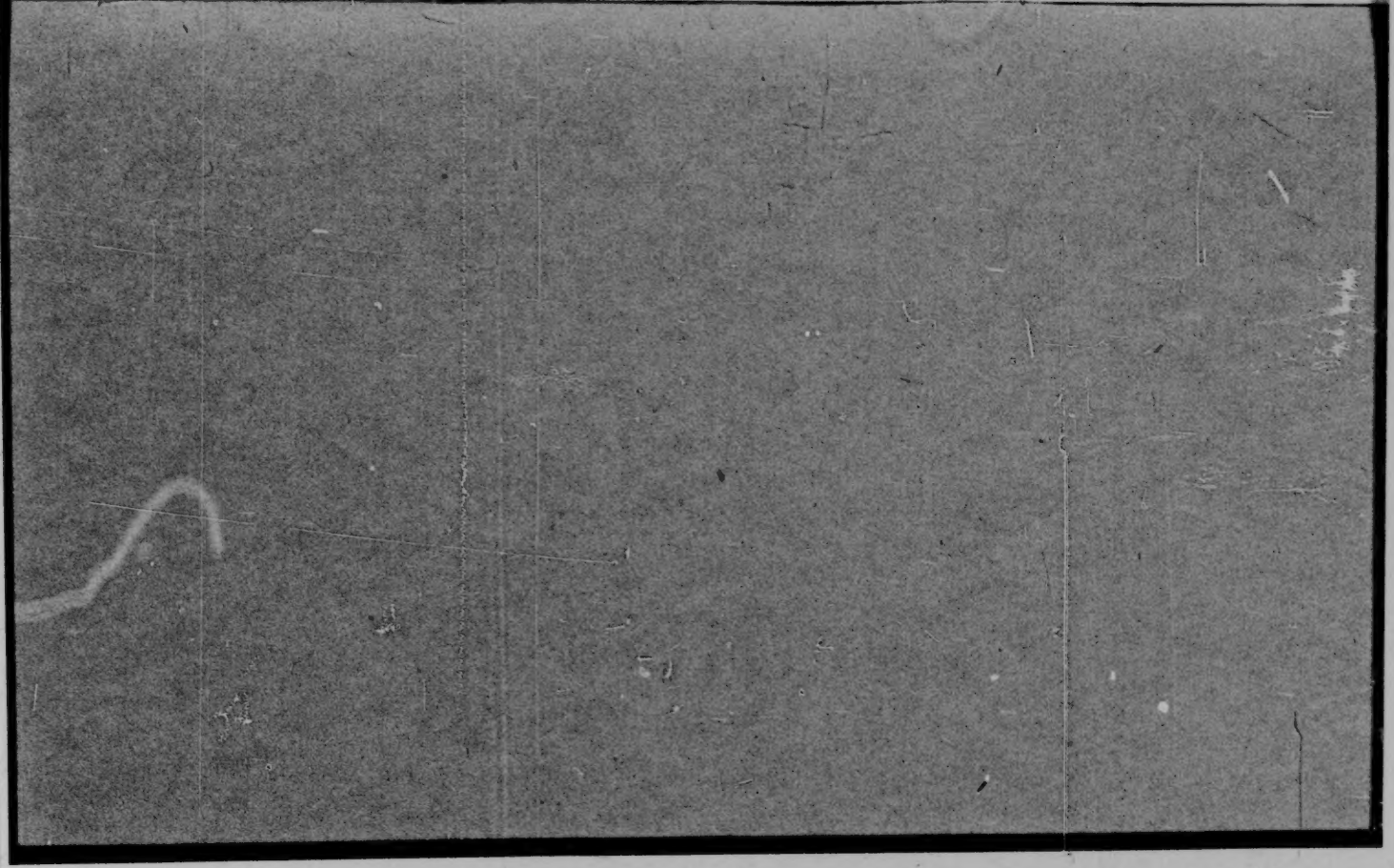
LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

On Appeal From The United States District Court For
The Southern District Of California

MOTION TO DISMISS OR AFFIRM

CHARLES R. KHOURY, JR.
836 Prospect Street
La Jolla, California 92036

Attorney for Appellee



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE
ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

On Appeal From The United States District Court For
The Southern District Of California

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and orders of the District Court be affirmed or the appeal be dismissed on the grounds that the decision of the District Court is clearly correct under the principles established by this Court in Frontiero v. Richardson, 411 U.S. 677 (1973) and Reed v. Reed, 404 U.S. 71 (1971) and that the questions presented are so unsubstantial as not to warrant further argument.